K. UMARKANDHA RAJAH

v.

E.L. MAGNESS

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
ABDUL HAMID OMAR FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 103 OF 1983]
30 APRIL 1983

CONTRACT: *Sale and purchase agreement - Right to retain custody of title deed - Whether condition precedent - Whether condition waived - Forfeiture of deposit - Whether in nature of penalty - Whether unconscionable.*

EVIDENCE: *Evidence of solicitor - Whether admissible.*

Under a sale and purchase agreement, the respondent, who was the registered owner of a piece of land in Klang, agreed to sell his undivided share of 10 lots to the appellant free from all encumbrances. A sum of RM5,000 was to be paid as deposit and part payment of the purchase price. The balance was to be paid in three instalments, part of the first instalment sum to be paid to the Bangkok Bank, Kuala Lumpur, for the discharge of the charge of the land, after which the appellant was to retain the title deed until sub-division and issue of separate titles. The appellant paid the deposit and the first instalment and the charge on the land was discharged but the title deed was not handed over to the appellant. As a result, the appellant at first refused to pay the second instalment but subsequently paid RM2,000 out of the RM15,000. The respondent then served notice on the appellant demanding payment of the balance of RM13,000 of the second instalment, and on receiving no response, served another notice terminating the agreement and forfeiting the deposit by virtue of the forfeiture clause in the agreement between the parties. The appellant brought in action against the respondent, claiming specific performance. His claim was dismissed. He appealed.

Held:

[1] The evidence of the solicitor who prepared the agreement to the effect that it was agreed between the parties that the handing over of the title deed to the appellant was to be a condition precedent to the payment of the second and third instalments was not admissible under s. 92 proviso (b) of the Evidence Act 1950.

[2] The handing over of the title deed to the appellant for his retention was a condition precedent to the payment by him of the second instalment. When the performance of one promise is dependent upon the obligation of the other party to perform his promise arising, the promise which must first be performed is a condition precedent to the performance of the other promise.

[3] The respondent was therefore in breach of the agreement in failing to hand over the title deed to the appellant.

[4] The appellant, however, had waived the right to retain the title deed by keeping quiet and, furthermore, by his request for extension of time to pay the second instalment, which request was granted by the respondent, and by his subsequent payment of the RM2,000 towards part payment of the second instalment. A waiver is a concession or indulgence

voluntarily granted, either expressly or impliedly, by one party to the other for the convenience and at the request of that party by not insisting upon the precise mode of performance provided in the contract. Waiver may be of a condition precedent or a concurrent condition.

[5] It was not a case where it is just and equitable to grant specific performance. The appellant had at no time shown any readiness and willingness to perform his own obligation, that is, he was not ready willing to "put the money on the table."

[6] On the other hand, though the forfeiture clause was not in the nature of a penalty, in the circumstances of the case it would be unconscionable to allow the deposit to be forfeited by the respondent and it was just and equitable for the money to be returned to the appellant.

[Order dismissing appellant's claim confirmed. Deposit and all other payments by appellant to be returned to appellant.]

Cases referred to:
Cheng Chuan Development Sdn. Bhd. v. Ng Ah Hock [1982] 2 MLJ 222
Tay Say Geok & Ors. v. H.G. Warren [1963] 29 MLJ 179
Stockloser v. Johnson [1954] 1 All ER 630
Kilmer v. British Columbia Orchard Lands Limited [1913] AC 319
Steedman v. Drinkle [1916] AC 275

Legislation referred to:
Evidence Act 1950, s. 92(b)

Other sources referred to:
Stoneham Vendor and Purchaser, 2nd Edn., pp. 923 & 924 para. 1825 & 1827
Halsbury's Laws of England, 4th Edn., Vol. 9, para. 572

For the appellant - Abdul Rahim Noor (K.C. Yap with him)
For the respondent - A. Ananthan

JUDGMENT

Syed Agil Barakbah FJ:

The appellant/plaintiff claimed specific performance of an agreement for the purchase of land from the respondent/defendant in the High Court, Kuala Lumpur. His claim was dismissed with costs and he has now appealed.

The undisputed facts are straightforward. The respondent was the registered owner of land held under C.T. 14262 Lot No. 109 s. 29 Town of Klang comprising approximately 119,000 sq. ft. in 13 lots. He agreed to sell his undivided share of 10 lots comprising an area of approximately 96,000 sq. ft. to the appellant. He would retain the remaining 3 lots. On 5 June 1973 both executed a sale agreement at the agreed purchase price of RM45,000 free from all encumbrances. A sum of RM5,000. was paid by the appellant by way of deposit and part payment of the purchase price, the receipt of which was acknowledged by the respondent. The balance of the purchase price would be paid in three instalments as follows:

(a) First instalment of RM10,000;
(b) Second instalment of RM15,000 which would be paid on or before 2 January 1974; and
(c) Third and final instalment of RM15,000 which would be paid on the date of the subdivision and transfer of titles of the said land on or before 2 July 1974 whichever was the later.

Out of the payment for the first instalment a sum of RM6,500 would be paid by the appellant as purchaser for and on behalf of the respondent as the vendor to Bangkok Bank, Kuala Lumpur for the discharge of the whole of the said land which was charged by the respondent and the balance sum of the instalment would be paid to the respondent on or before 2 July 1974. (Clause 2 of agreement on p. 79 of Record). After the discharge of the above-mentioned charge from the bank the appellant would retain in his custody the title deed of the said land until sub-division and separate titles were issued. (Clause 3). After the full purchase price had been paid and after sub-division had been effected in accordance with the survey plan, the respondent would deliver to the appellant or his nominee/s a valid and registrable transfer of the titles of the 10 lots of the said land free from all encumbrances. (Clause 4). Clause 8 stipulates that in the event of the purchaser failing to pay the balance of the purchase price as set out in Clause 2, the sum of RM5,000 paid by him shall be forfeited by the vendor by way of liquidated damages and this agreement shall then become null and void. The purpose of allowing the appellant to retain the title deed after the discharge from the bank was to enable him to acquire sub-division of the said land from the relevant authorities and thereafter to commence development of the said land prior to the final settlement of the purchase price and the transfer of the said land as stated in Clause 4. And in order to enable the appellant to perform the above, the respondent as the vendor agreed to render all assistance which should not be unreasonably withheld or give him a power of attorney for the purpose. The respondent also agreed not to object or question the appellant as to the mode of development. (Clause 9). Under Clause 15 time wherever mentioned in the agreement shall be of the essence of the agreement.

The appellant paid the first instalment of RM10,000 in full to the respondent by 2 July 1973 and the said land was duly discharged from the Bangkok Bank. The title deed however was not handed by the respondent to the appellant. As a result the appellant refused to pay the second instalment to the respondent. Subsequently however on 28 November 1973 the appellant paid a sum of RM1,000 and on 14 January 1974 another sum of RM1,000 towards the second instalment. On 11 April 1974 the respondent served notice on the appellant demanding the payment of the balance of RM13,000 due for the second instalment within four days of the receipt thereof (see p. 84) and thereafter on receiving no response from the appellant on 19 April 1974 served another notice terminating the agreement and forfeiting the sum of RM5,000 deposit by virtue of Clause 8 of the agreement. (See p. 85). The respondent then returned the balance sum of RM7,500 by cheque to the appellant less the sum forfeited. (See pp. 86 to 88). On 27 April 1974 the appellant through his solicitors returned the same to the respondent denying any breach of the agreement and giving the respondent 14 days' notice to fulfil his obligations under the agreement or to reach an amicable settlement failing which he would institute legal proceedings against him for specific performance without any further reference. The appellant also informed the respondent that he had caveated the land. Apparently that was done on 23 April 1974. (See certificate of official search in the Land Office at p. 55). After some correspondence between their solicitors, the appellant filed Civil Suit No. 610 of 1974 in the High Court, Kuala Lumpur.

There are two main issues to be considered viz:

1. Whether under Clause 3 of the agreement there is a condition precedent requiring the respondent to hand over the title deed to be retained by the appellant prior to the payment of the second and third instalments, and

2. Whether the appellant has waived such condition by making two payments of RM1,000 each towards the second instalment.

As regards the first issue the Judge accepted the evidence of the solicitor who prepared the agreement to the effect that it was the instruction of both parties that the handing over of the title deed to the appellant was to be a condition precedent to the payment of the second and third instalments. We do not think he was right in admitting the solicitor's evidence under s. 92 proviso (b) of the Evidence Act 1950. Clearly it is not a separate oral agreement envisaged by the proviso but an instruction to the solicitor to include the required condition in the agreement which he drafted. We agree with the respondent's Counsel who submitted and the appellant's Counsel who conceded that the evidence is not admissible under s. 92. The solicitor has in fact included the required condition in Clause 3 of the said agreement which should be read with the second limb of Clause 2(a).

What is a condition precedent in a contract? When the performance of one promise is dependent upon the obligation of the other party to perform his promise arising, the promise which must first be performed is a condition precedent to the performance of the other promise. It is a step which has to be taken by one party before the next step by the other party can be required to be taken. (See *Stoneham Vendor and Purchaser*, 2nd Edn., pp. 923 and 924 paras. 1825 and 1827). We agree with the learned Judge that the handing over of the title deed to the appellant for his retention is a condition precedent to the payment by him of the second instalment. It was also conceded by the appellant's Counsel.

It should be noted that according to the terms of Clause 2 (a) the appellant had to discharge the charge with Bangkok Bank by paying RM6,500 "for and on behalf of the vendor" (respondent) and thereafter retain the title in his custody under Clause 3 for the purpose of compliance by both parties of the other stipulations, particularly Clause 9. Evidence however showed that the appellant did not do so but paid the money to the respondent for the intended discharge. The respondent of course had no excuse to retain the title deed in his possession after the discharge but should have handed it over to the appellant. The respondent having failed to do so has committed a breach of the agreement. The appellant could have treated the contract as discharged at that stage. However apart from claiming to have verbally demanded from the respondent for the title deed, he did nothing else but kept quiet after being told by the respondent that he (respondent) would hand over the title deed after payment by him of the second instalment. Thereafter he requested the respondent for extension of time to pay the second instalment. In support of this the respondent's Counsel referred to a letter granting the extension (Exh. D2).

Objection was raised as to the admissibility of Exh. D2 on the ground that it had not been proved by the respondent who failed to testify in the Court below. That is true and the learned Judge did not refer to D2 at all in his judgment. Perusal of the record however revealed the fact that the appellant had actually received it as evidenced by his affidavit of document at item 13 of the first schedule being a document in his possession well before the trial. (See p. 104). Be that as it may the extension of time until 10 April 1974 was mentioned by the respondent in his subsequent letter dated April 11, 1974 (see p. 84) which is in the form of a notice to the appellant to pay up the second instalment within four days of the receipt thereof. Further the payments of RM1,000 on the two occasions by the appellant are supported by two receipts issued by the respondent towards part payment of the second instalment. (See p. 83).

In this regard the learned Judge's finding is that the appellant did not make the two payments under protest or without prejudice to his right to keep the title deed.

He said:

> The two payments made by the plaintiff were inconsistent with his contention that he should be given the title deed first before he can be required to pay the second instalment. (Page 49).

This is an inference based on facts which in our view is not in any way against the weight of the evidence adduced at the trial. We have no grounds to interfere. It is clear therefore that an extension as requested by the appellant was granted by the respondent. We agree with the learned Judge that the effect of that amounted to a waiver of his right to retain the title deed under Clause 3 of the agreement.

A waiver is commonly used in the law of contract to describe a concession or indulgence voluntarily granted by one party to the other for the inconvenience and at the request of that party by not insisting upon the precise mode of performance provided in the contract. (*Halsbury's Laws of England*, 4th Edn., Vol. 9, para. 572). It may be made by one party either expressly or by implication to waive the performance by the other of a dependent condition whether it be a condition precedent or a concurrent condition. The subject was dealt in detail by Salleh Abas FJ (as he then was) in *Cheng Chuan Development Sdn. Bhd. v. Ng Ah Hock* [1982] 2 MLJ 222 at 225. Suffice it to say for the purpose of this appeal that a waiver operates as excusing the mode of performance of the contract but does not extend to freeing the party at fault from performing it altogether. In the present appeal we are satisfied that by such waiver the respondent had to hand over the title deed to the appellant after the payment by the latter of the second instalment on 10 April 1974. The appellant however failed and refused to pay up the balance of the second instalment even after the expiration of the extended time and after he sued the respondent for specific performance of the agreement. He had at no time shown any readiness and willingness to perform his own obligation under the agreement which apart from any question of time was to pay the balance of the second and thereafter the third and final instalments both of which amounted to RM28,000 i.e. more than half of the total purchase price. He had also not made any arrangements to ensure that the respondent should eventually receive the whole of the purchase money. In short he was not ready and willing to "put the money on the table." (*Tay Say Geok & Ors. v. H.G. Warren* [1963] 29 MLJ 179, 184). We are of the view that this is not a case where it is just and equitable to grant specific performance.

As stated earlier the respondent had also committed a breach of the agreement by failing to hand over the title deed to the appellant. That would have entitled the appellant to damages had he taken prompt action and had not committed a breach by failing to settle the second instalment. Since the respondent was not free from fault, a question arose whether having terminated the agreement he was entitled to forfeit the deposit of RM5,000. The learned Judge ordered that the said sum be forfeited and the balance be returned by the respondent to the appellant. At common law the respondent was entitled to do so on the failure of the appellant to pay any of the instalments on the dates specified in the agreement. As stated by Denning LJ (as he then was) in *Stockloser v. Johnson* [1954] 1 All ER 630, 637:

> In the present case however, the defendant is not seeking to exact a penalty. He only want to keep money which only belongs to him. The money was handed to him as part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause - a forfeiture clause if you please - permitting him to keep it.

Equity however will only interfere and invoke the aid of its jurisdiction if the appellant shows that it will be unconscionable to allow the respondent to retain the money he has forfeited. Their Lordships of the Privy Council held in *Kilmer v. British Columbia Orchard Lands*

Limited [1913] AC 319 and in *Steedman v. Drinkle* [1916] AC 275 that the forfeiture clause in the sale agreement was in the nature of a penalty and relief was granted to the purchaser in spite of his failure to pay the instalments according to the terms of the contract. Both cases relate to the sale of land similar to the present case. In the former the vendor sued to enforce the forfeiture after the purchaser had defaulted; the purchaser paid into Court the instalment due and counter-claimed for specific performance which was also decreed. In the latter specific performance was not decreed but the purchaser was granted relief from forfeiture. The *ratio decidendi* in both the cases was that the forfeiture clause being a penalty it was unconscionable to allow the vendor to forfeit the sum deposited as part payment of the purchase price. As Lord Moulton said in *Kilmer's* case on p. 325:

> The circumstances of this case seems to bring it entirely within the ruling of the *Dagenham Dock* case - *Dagenham (Thames) Dock Co. Ex Parte Hulse* (LR 8 Ch 1022). It seems to be even a stronger case, for the penalty if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion and the money liable to confiscation becomes larger.

In this regard Romer LJ as quoted by Sommervell LJ in *Stockloser v. Johnson (supra)* on p. 634, was of the view that there are sufficient authorities giving the Court wider power to give such relief although there was no sharp practice by the vendor and although the purchaser was not able to find the balance. It would of course have to be shown that the retention of the instalments was unconscionable in all circumstances.

Denning LJ on p. 637 also expressed the view that where there is a forfeiture clause or the money is expressly paid as a deposit the buyer who is in default cannot recover the money at law at all. He may however have a remedy in equity but two things are necessary:

(1) the forfeiture clause must be a penalty i.e. the sum forfeited must be out of all proportion to the damage and

(2) it must be unconscionable for the seller to retain the money.

Turning to the present case the amount deposited is not disproportionate being only about 12% of the purchase price which is the usual amount of deposit in a contract for the sale of land. The appellant knew he would lose it if he did not complete the payments. Nevertheless the conduct of the respondent in failing to fulfil his obligation in handing over the title deed to the appellant after the latter had paid the first instalment, in our considered judgment amounts to a sharp practice. Having had the said land discharged from the bank at the expense of the appellant, he committed a breach of the agreement by not handing the title deed to enable the appellant to apply for sub-division of the land and thereafter to commence development. According to the evidence of his own witness, the Collector of Land Revenue Klang (DW1), the respondent had already applied for sub-division of the said land on 15 September 1972 well before the agreement was executed. He was unsuccessful because he had not applied for conversion of the said land from "agriculture" to "housing." He did so only on 18 May 1974 about one year after the execution of the sale agreement and after the payment of the first instalment and the discharge of the land from the bank. That clearly explains the reason for his failure and reluctance to hand over the title deed to the appellant who appeared to have been unaware of the true position. We are satisfied in the circumstances that it would be unconscionable to allow the deposit to be forfeited by the respondent and that it is just and equitable for the money to be returned to the appellant.

The order of the learned Judge in this respect is set aside, and substituted with the order that the deposit of RM5,000 and all the other sums paid towards the first instalment and part of the second instalment be returned by the respondent to the appellant.

We confirm the order dismissing the appellant's claim for specific performance of the agreement. We do not think in the circumstances that there should be any order as to costs both in the Court below and in this Court. The deposit of RM500 is to be returned to the appellant. The respondent has the advantage of having back the said land and of disposing of it if he still desires to do so at a much higher value considering the big rise in the price of land nowadays.

Also found at [1984] 2 CLJ 23